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No. 01-896

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,
Petitioners,

v.

JOHN B. MCCAULEY *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE BUSINESS ROUNDTABLE AS *AMICUS CURIAE*, SUPPORTING REVERSAL

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BRIEF OF THE BUSINESS ROUNDTABLE AS *AMICUS CURIAE* [1] SUPPORTING REVERSAL

The Business Roundtable submits this brief as *amicus curiae* to address the question accepted by the Court: Whether the restructuring costs that would be incurred by a business to comply with an injunction requested in a class action may satisfy the amount-in-controversy requirement of the diversity jurisdiction statute, where such compliance would cost more than $75,000 regardless of whether compliance related to the entire class or any single member of the class?

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *Amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The Business Roundtable is an association of chief executive officers of leading corporations with a combined workforce of more than 10 million employees in the United States and $3.5 trillion in revenues.[2] For thirty years, The Business Roundtable has been devoted to examining policy issues affecting the U.S. economy and developing positions which reflect sound economic and social principles.

The instant case is of substantial importance to The Business Roundtable and, we believe, the U.S. economy, because it addresses the ability of national businesses to adjudicate class actions in a federal forum and to avoid duplicative and inefficient litigation in matters involving substantial sums. It also addresses the even more fundamental issue of the impact on this country's businesses of judicial forum shopping for a state court or a judge with a proclivity to award huge damages to plaintiffs, often far out of proportion to actual damages. The resolution of this case will determine whether the substantial fixed costs imposed on American businesses to comply with injunctive relief will be disregarded by the federal courts in their calculation of the "amount-in-controversy" requirement of the diversity jurisdiction statute, 28 U.S.C § 1332(a).

SUMMARY OF ARGUMENT

The correct analysis of whether a "matter in controversy exceeds the sum or value of $75,000," 28 U.S.C § 1332(a), should use the "either viewpoint" rule (*i.e.*, from the viewpoint of either plaintiff or defendant) in class actions that seek injunctive relief, recognizing the reality that a controversy is not trivial if the injunctive relief requested

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[2] The chief executive officer of Citigroup Inc. is a member of The Business Roundtable. Citigroup Inc. indirectly owns petitioner Citibank (South Dakota), N.A.

would impose substantial costs on defendant. Those costs can satisfy the jurisdictional minimum in class actions, at least when they are structural fixed costs that a defendant would have to endure at the behest of even one successful plaintiff. Although the Ninth Circuit purported to adhere to the "either viewpoint" rule, its decision eviscerates that rule in class actions seeking injunctive relief.

ARGUMENT

I. THE "EITHER VIEWPOINT" RULE IS CONSISTENT WITH BOTH THE LANGUAGE AND PURPOSE OF THE AMOUNT-IN-CONTROVERSY REQUIREMENT.

When a plaintiff seeks injunctive relief, "the amount in controversy is measured by the value of the object of the litigation." *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). A number of courts, including at least four circuits, recognize the economic impact of injunctions on defendants and use the "either viewpoint" rule to calculate whether "the object of the litigation" meets the jurisdictional threshold of the diversity statute. *See Justice* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 927 F.2d 503, 505 (10th Cir. 1991); *Smith* v. *Washington*, 593 F.2d 1097, 1099 (D.C. Cir. 1978); *Berman* v. *Narragansett Racing Ass'n*, 414 F.2d 311, 314 (1st Cir. 1969); *Government Employees Ins. Co.* v. *Lally*, 327 F.2d 568, 569 (4th Cir. 1964). Under this rule, the courts value a claim by looking at the pecuniary result that the judgment would directly produce on either party. *Ronzio* v. *Denver & R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940).

Some circuits, however, adhere to the "plaintiff's only viewpoint" rule, and only look at the claim's value to the plaintiff in calculating the "amount-in-controversy," thereby ignoring the cost of injunctive relief to the defendants. *See Ericsson GE Mobile Communications, Inc.* v. *Motorola*

Communications & Elecs., Inc., 120 F.3d 216, 219 (11th Cir. 1997); *In re Corestates Trust Fee Litig.*, 39 F.3d 61, 65 (3d Cir. 1994); *Kheel* v. *Port of N.Y. Auth.*, 457 F.2d 46, 49 (2d Cir. 1972), *cert. denied*, 409 U.S. 983 (1972); *Massachusetts State Pharm., Ass'n* v. *Federal Prescription Serv., Inc.*, 431 F.2d 130, 132 n.1 (8th Cir. 1970); *Alfonso* v. *Hillsborough County Aviation Auth.*, 308 F.2d 724, 727 (5th Cir. 1962).[3]

Notwithstanding this split, the "either viewpoint" rule alone is consistent with the intent of Congress. The jurisdictional amount requirement was imposed by Congress "on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all *substantial* controversies where other elements of Federal jurisdiction are present," but not burden the federal courts with "petty controversies." *See Zahn* v. *International Paper Co.*, 414 U.S. 291, 293 n.1 (1973) (internal citations omitted) (emphasis added). The "plaintiff's-only viewpoint" rule clearly frustrates this intent by "keeping out cases where great sums of money are involved on the part of the defendant, but not the plaintiff." *Hoffman* v. *Vulcan Materials Co.*, 19 F. Supp. 2d 475, 480 (M.D.N.C. 1998).

Furthermore, utilizing the "either viewpoint" rule in injunction cases is supported by the express language of the diversity statute, which provides, in pertinent part, "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or

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[3] It is noteworthy that the most recent of these decisions suggests that the court believed it was "bound" to apply the "plaintiff's only viewpoint" rule and intimated that the "either viewpoint" approach is a better rule. *See Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc.*, 120 F.3d 216, 220 (11th Cir. 1997) ("recogniz[ing] that there are persuasive arguments to support the adoption of the either-viewpoint rule," but noting that "as a panel of this court, we remain bound to follow the plaintiff-viewpoint rule regardless of the wisdom we may attach to it").

value of $75,000, exclusive of interests and costs." 28 U.S.C. § 1332(a). The statute does not at all indicate that only one party's perspective should be considered in calculating this amount. If injunctive relief sought by plaintiffs would impose huge costs on the defendant, that request presents a substantial matter in controversy.

As a leading commentator noted, "[t]he jurisdictional-amount requirement reflects a congressional judgment that federal judicial resources should be devoted only to those diversity cases in which the financial stakes rise to a predetermined level. It is [therefore] difficult to understand why those financial stakes are not implicated when *either* party stands to gain or lose the statutorily determined amount or its equivalent." 15 James W. Moore, *Moore's Federal Practice*, § 102.109[4] (1997); *see also* 14A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3703 (1985) ("[The either viewpoint approach] seems to be the desirable rule, since the purpose of a jurisdictional amount requirement—to keep trivial cases away from the court—is satisfied when the case is worth a large sum to either party.").

Because the "jurisdictional amount prerequisite was enacted primarily to measure substantiality of the suit, the question of whether the controversy is substantial should not be answered unqualifiedly by looking only to the value of that which the plaintiff stands to gain or lose," but rather by examining the judgment's pecuniary effect on either party. *McCarty* v. *Amoco Pipeline Co.*, 595 F.2d 389, 395 (7th Cir. 1979) (internal quotation omitted).

II. THE "PLAINTIFF'S ONLY VIEWPOINT" RULE UNFAIRLY AND ARBITRARILY DENIES DEFENDANTS FACING SUBSTANTIAL COSTS THE PROTECTIONS OF DIVERSITY JURISDICTION.

Diversity jurisdiction was enacted to protect out-of-state litigants against local biases. *Guaranty Trust Co. of N.Y.* v. *York*, 326 U.S. 99, 111-12 (1945). It continues to serve this important purpose. 15 James W. Moore, *Moore's Federal Practice*, § 102.109[4] (1997). As a federal judge noted, "[a]nyone who believes that there is no local chauvinism in the state courts [today] is hiding his head somewhere." Charles Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote Another Way With Its Feet?*, N.Y. St. B. J. 20, 21 (1989).

By only looking at claims from the perspective of a plaintiff, the "plaintiff's only viewpoint" rule arbitrarily and unfairly denies the protection of diversity jurisdiction to defendants who face claims of substantial significance to them.

In contrast, the "either viewpoint" rule (which examines the pecuniary result of an injunction to both the plaintiff and the defendant) fairly ensures the protection of diversity jurisdiction to all litigants facing such claims. *See McCarty*, 595 F.2d at 395 ("[T]he interests of equity and fairness . . . would . . . be well served by allowing the plaintiff's claim to be evaluated for jurisdictional purposes by applying the either viewpoint rule.").

By denying the protections of diversity jurisdiction to corporations which are defending themselves against substantial lawsuits, the "plaintiff's only viewpoint" rule impedes the future development of interstate commerce. Indeed, numerous commentators have acknowledged the important role diversity jurisdiction plays in the development

of the national economy. James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 Harv. L. Rev. 1426, 1449 (1964) ("[Diversity] jurisdiction has been credited with exercising a great influence in fostering interstate commerce and investment, sustaining the public credit and sanctity of contracts, and welding the states into a single nation."); *see also* Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 Brook. L. Rev. 197, 209-10 (1982) (stating that the elimination of diversity jurisdiction would "chill entrepreneurial investment interstate").

III. THE "EITHER VIEWPOINT" RULE SHOULD NOT BE LIMITED TO CERTAIN TYPES OF ACTIONS.

Certain courts, including the Ninth Circuit, purportedly have adopted the "either viewpoint" rule, but then created significant exceptions by using the "plaintiff's only viewpoint" rule for cases involving multiple plaintiffs, actions involving injunctive relief or class actions where there is not a "common and undivided interest" among the plaintiffs. Because the "plaintiff's only viewpoint" rule is inconsistent with the intent of Congress and the purposes of the federal diversity jurisdiction statute, it should not be followed whether it applies to all cases or some subset of cases.

A. The "Either Viewpoint" Rule Does Not Violate the Principle of Non-Aggregation in Class Action Injunction Cases Because It Evaluates Each Claim for Injunctive Relief Separately.

It is well-settled that the diversity statute's amount-in-controversy requirement cannot be met by aggregating the claims of individual plaintiffs in a class action seeking only damages. *Zahn*, 414 U.S. at 300; *Snyder* v. *Harris*, 394 U.S.

332, 336 (1969). Certain courts have concluded that this principle limits the "either viewpoint" rule to actions that are not class actions or to actions that are not class actions for injunctive relief. *See, e.g., Gilman* v. *Wheat, First Sec., Inc.*, 896 F. Supp. 507, 509 (D. Md. 1995) (holding that the non-aggregation rule "prohibit[s] establishing the amount in controversy solely from the defendant's perspective" because it would permit plaintiffs to avoid the rule by simply requesting injunctive relief (internal citation omitted)); *Bassett* v. *Toyota Motor Credit Corp.*, 818 F. Supp. 1462, 1467 (S.D. Ala. 1993) (finding that the "either viewpoint" rule should not be used in class action lawsuits where there are separate and distinct claims).

Although the Ninth Circuit here purported to follow the "either viewpoint" rule, it severely limited its application in class actions. The Ninth Circuit found that this rule applied only in class actions where there was a "common and undivided interest" in the claim and then narrowly construed the "common and undivided interest" concept. *In re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 958-59 (9th Cir. 2001). The basis for this approach was the Ninth Circuit's conclusion that the "either viewpoint" rule conflicted with the principle of non-aggregation. *Id.* at 958.

Contrary to the findings of the Ninth Circuit, however, the "either viewpoint" rule can be applied in class actions without any offense to *Snyder* and *Zahn*. Neither *Snyder* nor *Zahn* involved a request for equitable relief. Rather, each of these cases addressed the issue of the aggregation of separate and distinct monetary claims by separate parties on one side of a litigation to establish diversity jurisdiction.

In *Snyder*, no individual plaintiff had a sufficient monetary claim to establish diversity jurisdiction. *Snyder*, 394 U.S. at 333. In *Zahn*, only the named class plaintiffs satisfied the jurisdictional minimum and the court consequently held that the federal courts only had jurisdiction over the claims of

these plaintiffs. *Zahn*, 414 U.S. at 292. Relying upon *Snyder*, the *Zahn* court concluded that "any plaintiff who does not [meet the jurisdictional amount] must be dismissed from the case -- 'one plaintiff may not ride in on another's coattails.'" *Zahn*, 414 U.S. at 301 (citing *Zahn* v. *International Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972)).

In this case, however, the existence of federal diversity jurisdiction does not depend upon aggregating the individual damage claims of each member of the putative class to establish the jurisdictional minimum. Here, it is undisputed that the asserted claims for injunctive relief would require the defendants to spend far in excess of $75,000 if the injunction were entered on behalf of any one plaintiff. *Ford Motor Co.*, 264 F.3d at 960. As no litigant is attempting to ride on the "coattail of another," the non-aggregation principle of *Snyder* and *Zahn* is not violated.

The harmonious application of the non-aggregation and "either viewpoint" rules has been illustrated by decisions in several courts, including the Seventh Circuit. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998); *see also In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 719 (D. Md. 2001); *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 834-35 (E.D. Mich. 1999). The Seventh Circuit recognized that *Zahn* and *Snyder* prevent aggregation of the defendant's cost of complying with *multiple* claims for injunctive relief, and therefore found that the appropriate standard "is the cost to each defendant of an injunction running in favor of *one plaintiff*." *Brand Name*, 123 F.3d at 610 (emphasis added).

B. The Application of the "Either Viewpoint" Rule in Class Action Injunction Cases Will Not Allow the Circumvention of the Non-Aggregation Principle.

The Ninth Circuit attempted to provide justification for its limitation of the "either viewpoint" rule to only those class actions where there is a "common and undivided" interest by making the policy argument that it would otherwise permit "plaintiffs with minimal damages [to] dodge the non-aggregation rule by praying for an injunction." *Ford Motor Co.*, 264 F.3d at 959. In an opinion by Judge Posner, the Seventh Circuit acknowledged this concern but recognized that it was "misplaced." *Brand Name*, 123 F.3d at 610. Judge Posner explained that in cases involving separate and distinct claims, each claim against a defendant for injunctive relief "must be separately evaluated" and stressed that "[t]he test . . . is the cost to each defendant of an injunction running in favor of one plaintiff"—not to the entire plaintiff class. *Id.*

Moreover, the Ninth Circuit's concern is overstated. Many plaintiffs are happy to stay in state court,[4] where judges commonly are elected and thought to be more responsive to their concerns. Many plaintiffs with an eye on *Snyder* and *Zahn* seek to avoid federal jurisdiction by limiting their damages claim to less than the federal jurisdictional amount, *see, e.g., Brand Name*, 123 F.3d at 607 (noting that plaintiffs were cautious in pleading less than $50,000 in damages), and some plaintiffs join non-diverse litigants to defeat any possible assertion of federal jurisdiction by defendants. *See,*

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[4] *See, e.g.*, Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. Times, Aug. 20, 2001, at A1 (explaining the general preference of plaintiffs' lawyers to litigate in state court and in particular the state of Mississippi which "has gained a national reputation as a place where consumers fare well in court—so well that [it] has become a magnet for liability suits").

e.g., Georgene M. Vairo, *Forum Selection*, Nat'l Law J., Nov. 9, 1998, at B14 (discussing the use of fraudulent joinder of non-diverse parties by plaintiffs to keep cases from being removed to federal court). The recognition by this Court that a structural remedy in compliance with an injunction can establish the minimum amount for diversity jurisdiction will have a self-policing effect: only in those cases where an injunction is a significant element of the desired remedy will there be federal jurisdiction; in the vast majority of cases, the remedy sought still will be only damages, bypassing a non-essential request for injunctive relief to avoid creating a risk of losing the state court forum.

Furthermore, the Court of Appeals mistakenly concluded that the application of the "either viewpoint" approach in class actions involving "separate and distinct" claims would require the courts to recognize the "total detriment" to the defendant (or *all* compliance costs incurred by a defendant to comply with an injunction). *Ford Motor Co.*, 264 F.3d at 959 (internal quotation omitted). The Ninth Circuit apparently reasoned that the recognition of all these costs, which in this case it inexplicably found to constitute "fixed administrative" costs, would permit "every case" to meet the jurisdictional threshold. *Id.* at 960-61. As discussed below, this approach is mistaken, as it fails to recognize the legitimate distinction made by Judge Posner in *Brand Name* between the "structural" and "ministerial" costs of compliance. *See Brand Name*, 123 F.3d at 610. The exclusion of "ministerial" costs to a defendant from the calculation of the pecuniary result of an injunction ensures that only those lawsuits which seek substantive structural relief meet the jurisdictional threshold.

C. The Plaintiffs Have a "Common And Undivided Interest" in the Requested Equitable Relief.

This same unfounded concern for the circumvention of the non-aggregation principle also apparently led the Court of Appeals to construe narrowly claims representing "common and undivided" interests, *Ford Motor Co.*, 264 F.3d at 960, and to reject the principle accepted by numerous courts that a "common and undivided right" is present if the "[d]efendants' costs of compliance do not depend upon the size of the class or the identity of its members." *Cardizem Antitrust Litig.*, 90 F. Supp. 2d at 836; *see also Hoffman*, 19 F. Supp. 2d at 483 ("[B]ecause the defendant will sustain this loss even if only one plaintiff were to obtain the injunction, this is a case where plaintiffs have an undivided interest in the injunction . . . .").

The non-aggregation principle does not apply to claims asserting a "common and undivided interest." *Snyder*, 394 U.S. at 335. Accordingly, where plaintiffs "unite to enforce a single title or right, in which they have a common and undivided interest," the value of the claims of multiple plaintiffs may be considered collectively to meet the statutory threshold. *Zahn*, 414 U.S. at 294 (internal quotation omitted). Here, each plaintiff seeks the same injunctive relief—the reinstitution of the petitioners' rebate program. As such, relief will either be granted or denied as to all plaintiffs. Although structural costs to defendants of re-instituting the program would be the same whether relief were granted to one plaintiff or to many, realistically this relief would less likely be granted to a single plaintiff. Plainly, under these circumstances, the plaintiffs have a "common and undivided interest" in the injunction, which should not be ignored based upon an unfounded concern for future circumvention of the non-aggregation principle. *See, e.g.*, Gibbs v. *E.I. duPont de Nemours & Co.*, 876 F. Supp. 475, 479 (W.D.N.Y. 1995)

(finding the plaintiffs' request for injunctive relief, the institution of a common medical monitoring fund, constituted a "common and undivided right").

D. The Rule Applied by the Court Of Appeals Is Illogical, Encourages Duplicative Litigation and Allows Plaintiffs to Manipulate Federal Jurisdiction.

The Ninth Circuit's rule is inherently illogical. Under that rule, a single plaintiff could maintain a federal action if the pecuniary result of an injunction for a defendant exceeded the jurisdictional threshold. This very same plaintiff, however, could not maintain this action in federal court if she decided to promote judicial economy by representing a class or joining with other plaintiffs. The Ninth Circuit itself recognized the anomaly of its approach:

> [L]ogic would dictate that [the "either viewpoint" rule] should apply to all multi-party complaints. While it may seem paradoxical to decline jurisdiction in the multiplaintiff setting, where the potential loss to defendants typically is well beyond the jurisdictional amount threshold, it is implicit in the [non-aggregation] rule . . . that it will sometimes be more difficult for a party asserting federal jurisdiction to establish the minimum amount of controversy in a multiplaintiff case than in a much smaller single-plaintiff case.

Brand Name, 123 F.3d at 958 (internal citations omitted).[5]

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[5] Contrary to the findings of the Ninth Circuit, it is not implicit in the non-aggregation principle that it may be more *difficult* for a plaintiff in a multi-plaintiff action to establish federal jurisdiction. Rather, this principle holds that the "amount-in-controversy" requirement is not lowered (or made *easier*) for a plaintiff because he has joined with other plaintiffs to bring the action. *Zahn*, 414 U.S. at 301-02; *Snyder*, 269 F.2d at 340-41.

The Ninth Circuit approach also permits plaintiffs to manipulate the diversity jurisdiction requirements to forum shop. If it is advantageous for a plaintiff to be in state court, plaintiffs will simply bring a class action or add other plaintiffs, regardless of the costs of structural injunctive relief. However, if a plaintiff would prefer the federal forum, she will file a single claim for equitable relief in federal court. Plainly, such a rule unfairly prejudices a defendant and subverts the purpose of the "amount-in-controversy" requirement. It also encourages the filing of multiple lawsuits, with the potential for inconsistent results.

The "either viewpoint" rule applied in certain class actions that seek injunctive relief is not a device to evade the limitation on the amount in controversy in federal diversity actions, or to open the federal courts to trivial cases. Rather, it is a recognition that there are some class actions that seek injunctive relief that would not only subject the defendant to substantial cost, but that the injunction, if granted, would force the defendant to forego a benefit or endure a cost that would have to be faced whether injunctive relief were granted to one plaintiff or to thousands. *See, e.g., Earnest* v. *General Motors Corp.*, 923 F. Supp. 1469, 1472-73 (N.D. Ala. 1996) (injunction prohibiting use of allegedly defective engines or engine control modules and requiring replacement by a new line of engines); *Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d at 719 (injunction seeking to compel Microsoft to redesign its operating system to separate a function embedded within it); *Katz* v. *Warner-Lambert Co.*, 9 F. Supp. 2d 363, 364 (S.D.N.Y. 1998) (injunction seeking to compel pharmaceutical research).

E. In Measuring the Pecuniary Result of an Injunction to a Business, The Courts Should Recognize at Least the Structural Costs To Be Imposed on Defendants.

In this case, it has not been disputed that Ford and Citibank would incur costs of in excess of $75,000 to reinstate the rebate program, and would incur additional costs of $75,000 *per month* to maintain the requested rebate center *and* costs significantly in excess of $75,000 to maintain the pertinent computer software systems and software, customer service procedures and training to comply with the requested relief. J.A. 88-89.

The Ninth Circuit accepted that these costs would be incurred if there were only one plaintiff, but then inexplicably disregarded these costs on the basis that they only constituted "fixed administrative costs" which could not be used to satisfy the amount-in-controversy requirement. *Ford Motor Co.*, 264 F.3d at 960-61. Purporting to follow *Brand Name*, the Ninth Circuit reasoned that allowing "fixed administrative costs" such as these to create federal jurisdiction would mean that "every case [seeking equitable relief], however trivial, against a large company would cross the threshold." *Id.* (citing *Brand Name*, 123 F.3d at 610). If the Ninth Circuit is asserting that all costs of complying with an injunction constitute unallowable "administrative costs," then the effect is not merely to eviscerate the either viewpoint rule in class actions seeking injunctions. It would also render that rule inapplicable to most single plaintiff actions seeking an injunction. If the structural costs to be incurred by Citibank and Ford are outside the evaluation process as "administrative," it could be difficult to conceive of any costs of complying with an injunction that are "non-administrative."

In any event, the Ninth Circuit misconstrued both the concerns expressed by Judge Posner, and the decision, in

Brand Name. Judge Posner did indicate that some costs might not be allowed in determining the jurisdictional threshold, but these were carefully limited to "*clerical or ministerial costs of compliance*" because they would allow "every case, however trivial, against a large company" to cross the threshold. *Brand Name*, 123 F. Supp. at 610 (emphasis added).[6] Judge Posner specifically observed that:

> Even if an injunction *doesn't* require the defendant to restructure its business or give up a lucrative lawful business opportunity, *but merely tells it to stop doing something illegal*, such as conspiring to fix prices, there will be lawful costs of compliance. Just the cost of duplicating an injunction in a case such as this and distributing the copies to all the relevant personnel might exceed [the jurisdictional minimum].

Id. (emphasis added.) Here, petitioners do *not* seek to establish federal jurisdiction by including any mailing, copying or other "ministerial or clerical" costs or any costs associated with the cessation of alleged illegal activity.

Ministerial or clerical costs can in almost all cases be readily distinguished from other costs, particularly the "structural fixed" costs involved here. Most of the cases that refused to consider injunctive relief as a valid basis for federal diversity jurisdiction involved situations where the cost alleged to satisfy the jurisdictional requirement was an accumulation of small benefits to each of thousands of

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[6] From a defendant's perspective, any costs that will be incurred to comply with an injunction, whether they are deemed to be "ministerial" or "administrative" or "structural," are a burden to the defendant and should be recognized by the Court as such. However, to the extent that courts distinguish between "structural" and "ministerial" costs, the present case clearly constitutes one of the relatively few cases in which the "structural" compliance costs are sufficient to meet the jurisdictional threshold.

plaintiffs, *Snow* v. *Ford Motor Co.*, 561 F.2d 787, 790-91 (9th Cir. 1977) ($11 kits); *Gilman*, 896 F. Supp. at 510 (order flow payments of pennies a transaction).

This case does not turn on whether a sufficient number of plaintiffs would receive benefits of up to $3500 each (the maximum amount of rebate permitted under the program) to accumulate more than $75,000 in total cost to defendants. Rather, it turns on when and how a court should distinguish from the "accumulation" cases those relatively few instances in which, to put even a single plaintiff in a position to receive the ultimate benefit, the defendant must at the outset expend a substantial sum to alter a manufacturing process, *Earnest*, 923 F. Supp. at 1472-73, or redesign software, *Microsoft Corp. Antitrust Litig.*, 127 F. Supp. at 719, or re-institute an entire rebate program discontinued years ago. *Ford Motor Co.*, 264 F.3d at 960-61. Such requested relief would impose substantial business costs to a defendant, a cost whose magnitude readily satisfies the jurisdictional "matter in controversy [that] exceeds the sum or value of $75,000." 28 U.S.C § 1332(a).

Moreover, there should be few cases where there could be any real confusion between what constitutes "structural fixed" costs and what constitutes "ministerial" costs. There is a readily available lodestar. If the costs would exceed $75,000 in complying with the injunction for a single plaintiff, those could scarcely be ministerial.

In this case, the defendants rightfully seek to have the court recognize the substantial structural costs that they must incur to comply with the requested injunctive relief, specifically the reinstatement of the business apparatus for tracking accrual of rebates, maintaining computer systems for verifying which purchases qualify for rebate accrual, and paying the salaries of individuals engaged in the operation of the rebate program. J.A. 88-89. These are precisely the costs that Judge Posner observed should be recognized in the application of the

"either viewpoint" rule: "Looked at from the defendants' standpoint, the minimum amount in controversy would be present if the injunction sought by the plaintiffs would require *some alteration in the defendant's method of doing business* that would cost the defendant at least the statutory minimum amount." *Brand Name*, 123 F.3d at 609 (emphasis added); *see also Hoffman*, 19 F. Supp. 2d at 475 ("a defendant could show jurisdictional amount by measuring the costs defendant would face if it had to alter its method of business and/or if it had to forego a lucrative transaction") (citing *Brand Name*, 123 F.3d at 609).

Most class action cases seek only damages, and plaintiffs who wish to litigate in state court have ample means to assure that venue under the rules. Even those class action complaints that seek equitable relief do not often request an injunction where the costs to defendant are structural and substantial enough to reach the jurisdictional minimum. This case is not like the majority of class actions such as *Snow*, where the relief sought was an $11 kit, and the record showed that only by embracing the cost of thousands of such kits could the jurisdictional threshold be reached. 561 F.2d at 790-91. To the contrary, in this unusual case, on this record, the evidence is that petitioners would incur costs in excess of the jurisdictional minimum whether the injunctive relief was sought by one plaintiff or by a class of thousands.

F. The Costs Incurred to Comply with an Injunction Should Not Be Prorated Across the Plaintiff Class.

Some courts have purportedly recognized both the "either viewpoint" rule and structural costs in complying with an injunction, but have then negated these determinations by valuing these costs through a proration process across the entire plaintiff class. *See, e.g., Crosby* v. *America Online, Inc.*, 967 F. Supp. 257, 264-65 (N.D. Ohio 1997). In *Crosby*,

the plaintiff class sought an injunction against AOL to prevent it from advertising or selling its services to new customers without an appropriate disclaimer. *Id.* at 260. Because the putative class was composed of approximately 270,000 AOL subscribers, the Court concluded that "the jurisdictional requirement [would] not be met . . . unless it can be said that AOL's cost of complying with the requested injunction will total *20 Billion Dollars*." *Id.* (emphasis added) ($75,000 times 270,000). The *Crosby* decision demonstrates that the proration approach is simply another way – except in the most extraordinary circumstances – to preclude federal jurisdiction in class action injunction cases. If the class of plaintiffs were as few as 1,000 (0.37% of the number in *Crosby*), the costs would need to be over $75 million under the proration approach.

Although the *Crosby* court purported to rely upon *Snyder* and *Zahn* in adopting this approach, it contradicts a fundamental premise of the non-aggregation principle – a claim of one plaintiff should not affect the claim of another for purposes of establishing diversity jurisdiction. Moreover, the *Crosby* approach results in a paradox of the type also created by the Ninth Circuit's analysis: individual plaintiffs may maintain federal jurisdiction, while multiple plaintiffs seeking identical injunctive relief may not.

In addition, this result subverts the purpose of the amount-in-controversy requirement. Plainly, the significance of a lawsuit cannot be diminished by the fact that numerous additional litigants are involved. Nor should a defendant be required to establish that an injunction could cost it hundreds of millions, if not billions, of dollars before it is entitled to invoke federal jurisdiction.

CONCLUSION

For the foregoing reasons, The Business Roundtable, as *amicus curiae*, urges the Court to reverse the order entered by the Court of Appeals, to adopt the "either viewpoint" rule in class action contexts, and to recognize at least the structural costs that would be incurred by defendant businesses to comply with injunctive relief in valuing the amount in controversy in a diversity action.

Respectfully submitted,

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